

## II

(Acts whose publication is not obligatory)

## COUNCIL

## COUNCIL DIRECTIVE

of 28 June 1990

on the establishment of the internal market for telecommunications services through the implementation of open network provision

(90/387/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas Article 8 a of the Treaty stipulates that the internal market shall comprise an area without internal frontiers in which the free movement of services is ensured, in accordance with the provisions of the Treaty;

Whereas the Commission submitted a Green Paper on the development of the common market for telecommunications services and equipment, dated 30 June 1987, and a communication on the implementation of that Green Paper up to 1992, dated 9 February 1988;

Whereas the Council adopted on 30 June 1988 a resolution on the development of the common market for telecommunications services and equipment up to 1992 <sup>(4)</sup>;

Whereas the full establishment of a Community-wide market in telecommunications services will be promoted by the rapid

introduction of harmonized principles and conditions for open network provision;

Whereas, since situations differ and technical and administrative constraints exist in the Member States, this objective should be realized in stages;

Whereas the conditions of open network provision must be consistent with certain principles and must not restrict access to networks and services except for reasons of general public interest, hereinafter referred to as 'essential requirements';

Whereas the definition and application of such principles and essential requirements must take full account of the fact that any restrictions of the right to provide services within and between Member States must be objectively justified, must follow the principle of proportionality and must not be excessive in relation to the aim pursued;

Whereas the conditions of open network provision must not allow for any additional restrictions on the use of the public telecommunications network and/or public telecommunications services except those restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law;

Whereas tariff principles should be clearly laid down to ensure fair and transparent conditions for all users;

Whereas this entire Directive must be read in the light of Annex III which lays down a work programme for the first three years;

Whereas the establishment of harmonized conditions of open network provision must be a progressive process and must be prepared with the assistance of a committee composed of

<sup>(1)</sup> OJ No C 39, 16. 2. 1989, p. 8.

<sup>(2)</sup> OJ No C 158, 26. 6. 1989, p. 300, OJ No. C 149, 18. 6. 1990.

<sup>(3)</sup> OJ No C 159, 26. 6. 1989, p. 37.

<sup>(4)</sup> OJ No C 257, 4. 10. 1988, p. 1.

representatives of the Member States, which consults the representatives of the telecommunications organizations, the users, the consumers, the manufacturers and the service providers; whereas this process must also be open to all parties concerned and therefore sufficient time must be given for public comment;

Whereas the Community-wide definition of harmonized technical interfaces and access conditions must be based on the definition of common technical specifications based on international standards and specifications;

Whereas work to be undertaken in this area must take full account, *inter alia*, of the framework resulting from the provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations <sup>(1)</sup>, as last amended by Directive 88/182/EEC <sup>(2)</sup>, Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment <sup>(3)</sup> and Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications <sup>(4)</sup>;

Whereas the formal adoption on 12 February 1988 of the statutes of the European Telecommunications Standards Institute (ETSI) and of the associated internal rules has created a new mechanism for producing European telecommunications standards;

Whereas the Council in its resolution of 27 April 1989 on standardization in the field of information technology and telecommunications <sup>(5)</sup> supported the work of ETSI and invited the Commission to contribute to the coherent development of ETSI and lend it its support;

Whereas the Community-wide definition and implementation of harmonized network termination points establishing the physical interface between the network infrastructure and users' and other service providers' equipment will be an essential element of the overall concept of open network provision;

Whereas Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment <sup>(6)</sup> requires Member States to ensure that users who so request are given access to network termination points within a reasonable time period;

Whereas one of the principal aims of the establishment of an internal market in telecommunications services must be the creation of conditions to promote the development of Europe-wide services;

<sup>(1)</sup> OJ No L 109, 26. 4. 1983, p. 8.

<sup>(2)</sup> OJ No L 81, 26. 3. 1988, p. 75.

<sup>(3)</sup> OJ No L 217, 5. 8. 1986, p. 21.

<sup>(4)</sup> OJ No L 36, 7. 2. 1987, p. 31.

<sup>(5)</sup> OJ No C 117, 11. 5. 1989, p. 1.

<sup>(6)</sup> OJ No L 131, 27. 5. 1988, p. 73.

Whereas, in its abovementioned resolution of 30 June 1988, the Council considered the taking fully into account of the external aspects of Community measures on telecommunications to be a major policy goal;

Whereas the Community attaches very great importance to the continued growth of cross-border telecommunications services, to the contribution that telecommunications services provided by companies, firms or natural persons established in a Member State may make to the growth of the Community market, and to the increased participation of Community service providers in third country markets; whereas it will therefore be necessary, as specific Directives are drawn up, to ensure that these objectives are taken into account with a view to reaching a situation where the progressive realization of the internal market for telecommunications services will, where appropriate, be accompanied by reciprocal market opening in other countries;

Whereas this result should be achieved preferably through multilateral negotiations in the framework of GATT, it being understood that bilateral discussions between the Community and third countries may also contribute to this process;

Whereas this Directive should not address the problems of mass media, meaning problems linked to broadcasting and distribution of television programmes via telecommunications means, in particular cable television networks, which need special consideration;

Whereas neither should this Directive address the question of communication via satellite for which, according to the abovementioned Council resolution of 30 June 1988, a common position should be worked out;

Whereas the Council, on the basis of a report which the Commission is to submit to the European Parliament and the Council, and in accordance with Article 100b of the Treaty, will review, during 1992, any remaining conditions for access to telecommunications services which have not been harmonized, the effects of these conditions on the workings of the internal market for telecommunications services, and the extent to which this market needs to be further opened up,

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

1. This Directive concerns the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services.

2. The conditions referred to in paragraph 1 are designed to facilitate the provision of services using public telecommunications networks and/or public telecommunications services, within and between Member States, and in particular the provision of services by companies, firms or natural persons established in a Member State other than that of the company, firm or natural person for whom the services are intended.

### Article 2

For the purposes of this Directive:

1. 'telecommunications organizations' means public or private bodies, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, where applicable, public telecommunications services.

For the requirements of this Directive, Member States shall notify the Commission of the bodies to which they have granted special or exclusive rights;

2. 'special or exclusive rights' means the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity;
3. 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;
4. — 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television;  
— 'public telecommunications services' means telecommunications services whose supply Member States have specifically entrusted *inter alia* to one or more telecommunications organizations;
5. 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network;
6. 'essential requirements' means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. These reasons are security of network operations, maintenance of network integrity and, in justified cases, interoperability of services and data protection.

Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy;

7. 'voice telephony' means the commercial provision for the public or direct transport of real-time speech via the

public switches network or networks such that any user can use equipment connected to a network termination point to communicate with another user of equipment connected to another termination point;

8. 'telex service' means the commercial provision for the public of direct transport of telex messages in accordance with the relevant 'Comité consultatif international télégraphique et téléphonique' (CCITT) recommendation via the public switched network or networks, whereby any user can use equipment connected to a network termination point to communicate with another user using another termination point;
  9. 'packet- and circuit-switched data services' means the commercial provision for the public of direct transport of data via the public switched network or networks such that any equipment connected to a network termination point can communicate with equipment connected to another termination point;
  10. 'open network provision conditions' means the conditions, harmonized according to the provisions of this Directive, which concern the open and efficient access to public telecommunications networks and, where applicable, public telecommunications services and the efficient use of those networks and services.
- Without prejudice to their application on a case-by-case basis, the open network provision conditions may include harmonized conditions with regard to:
- technical interfaces, including the definition and implementation of network termination points, where required,
  - usage conditions, including access to frequencies where required,
  - tariff principles;
11. 'technical specifications', 'standards' and 'terminal equipment' are given the same meaning for those terms as in Article 2 of Directive 86/361/EEC.

### Article 3

1. Open network provision conditions must comply with a number of basic principles set out hereafter, namely that:
  - they must be based on objective criteria,
  - they must be transparent and published in an appropriate manner,
  - they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.

2. Open network provision conditions must not restrict access to public telecommunications networks or public telecommunications services, except for reasons based on essential requirements, within the framework of Community law, namely:

- security of network operations,
- maintenance of network integrity,
- interoperability of services, in justified cases,
- protection of data, as appropriate.

In addition, the conditions generally applicable to the connection of terminal equipment to the network shall apply.

3. Open network provision conditions may not allow for any additional restrictions on the use of the public telecommunications networks and/or public telecommunications services except the restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law.

4. The Council, acting in accordance with Article 100a of the Treaty, may, if necessary, modify the points set out in paragraphs 1 and 2.

5. Without prejudice to the specific Directives provided for in Article 6 and in so far as the application of the essential requirements referred to in paragraph 2 of this Article may cause a Member State to limit access to one of its public telecommunications networks or services, the rules for uniform application of the essential requirements, in particular concerning the interoperability of services and the protection of data, shall be determined, where appropriate, by the Commission, in accordance with the procedure laid down in Article 10.

#### Article 4

1. Open network provision conditions shall be defined in stages under the procedure set out hereafter.

2. Open network provision conditions shall concern the areas selected in accordance with the list in Annex I.

The Council, acting in accordance with Article 100a of the Treaty, may, if necessary, modify this list.

3. Using the list referred to in paragraph 2, the Commission shall draw up a work programme each year, under the procedure laid down in Article 9.

4. For the work programme referred to in paragraph 3, the Commission shall:

- (a) initiate detailed analysis, in consultation with the committee referred to in Article 9, and draw up reports on the results of this analysis;
- (b) invite, by publication of a notice to that effect in the *Official Journal of the European Communities*, public

comment by all parties concerned on the reports on the detailed analysis provided for in subparagraph (a). The period for submitting such comment shall be not less than three months from the date of publication of the said notice;

(c) request, where appropriate, the European Telecommunications Standards Institute (ETSI) to draw up European standards, taking account of international standardization as a basis for setting up, where required, within specified time limits, harmonized technical interfaces and/or service features. In so doing, ETSI shall coordinate, in particular, with the Joint European Standards Institution CEN/Cenelec;

(d) draw up proposals for open network provision conditions in accordance with Article 3 and with the open network provision reference framework described in Annex II.

5. For 1990, 1991 and 1992 a work programme shall be drawn up in order to implement the guidelines in Annex III.

#### Article 5

1. Reference to European standards drawn up as a basis for harmonized technical interfaces and/or service features for open network provision according to Article 4 (4) (c) shall be published in the *Official Journal of the European Communities* as suitable for open network provision.

2. The standards mentioned under paragraph 1 shall carry with them the presumption:

- (a) that a service provider who complies with those standards fulfils the relevant essential requirements, and
- (b) that a telecommunications organization which complies with those standards fulfils the requirement of open and efficient access.

3. If the implementation of European standards within the meaning of Article 5 (2) appears inadequate to ensure the interoperability of transfrontier services in one or more Member States, reference to European standards may be made compulsory under the procedure laid down in Article 10, to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users. The procedure provided for in this paragraph may in no way affect the implementation of Articles 85 and 86 of the Treaty.

4. Where a Member State or the Commission considers that the harmonized standards mentioned under paragraph 1 do not correspond to the objective of open and efficient access, in particular the basic principles and the essential requirements referred to in Article 3, the Commission or the Member State concerned shall bring the matter before the committee referred to in Article 9, giving the reasons therefore. The committee shall deliver an opinion without delay.

5. In the light of the committee's opinion and after consultation of the standing committee set up by Directive 83/189/EEC, the Commission shall inform the Member States whether or not it is necessary to withdraw references to those standards from the *Official Journal of the European Communities*.

#### Article 6

Following the completion of the procedures set out in Articles 4 and 5, and acting in accordance with Article 100a of the Treaty, the Council shall adopt specific Directives establishing open network provision conditions including a time schedule for implementing them.

#### Article 7

The Council, acting in accordance with Article 100a of the Treaty, taking Article 8c of the Treaty into consideration, shall, where required, adopt measures for harmonizing declaration and/or licensing procedures for the provision of services via public telecommunications networks, with a view to establishing conditions in which there would be mutual recognition of declaration and/or licensing procedures.

#### Article 8

During 1992 the Council, on the basis of a report which the Commission shall submit to the European Parliament and the Council, shall review progress on harmonization and any restrictions on access to telecommunications networks and services still remaining, the effects of those restrictions on the operation of the internal telecommunications market, and measures which could be taken to remove those restrictions, in conformity with Community law, taking account of technological development and in accordance with the procedure provided for under Article 100b of the Treaty.

#### Article 9

1. The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

The committee shall, in particular, consult the representatives of the telecommunications organizations, the users, the consumers, the manufacturers and the service providers. It shall lay down its rules of procedure.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

#### Article 10

1. Notwithstanding the provisions of Article 9, the following procedure shall apply in respect of the matters covered by Article 3 (5) and Article 5 (3).

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

#### Article 11

1. Member States shall bring into force the laws, regulations and administrative provisions necessary in order to comply with this Directive before 1 January 1991 at the latest. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

#### Article 12

This Directive is addressed to the Member States.

Done at Luxembourg, 28 June 1990.

For the Council

The President

M. GEOGHEGAN-QUINN

## ANNEX I

Areas for which open network provision conditions may be drawn up in accordance with Article 4

Areas shall be selected from the following list in accordance with the procedures laid down in Article 4:

1. leased lines;
  2. packet- and circuit-switched data services;
  3. Integrated Services Digital Network (ISDN);
  4. voice telephony service;
  5. telex service;
  6. mobile services, as applicable;
- subject to further study,
7. new types of access to the network, such as access, under certain conditions, to the circuits connecting subscriber premises to the public network exchange ('data over voice') and access to the network's new intelligent functions, according to progress on definition and technological development;
  8. access to the broadband network, according to progress on definition and technological development.
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## ANNEX II

**Reference framework for drawing up proposals on open network provision conditions in accordance with Article 4 (4) (d)**

Proposals on open network provision conditions as defined in Article 2 (10) should be drawn up in accordance with the following reference framework:

**1. Common principles**

In drawing up the conditions described in this Annex, due account will be taken of the relevant rules of the Treaty.

Open network provision conditions shall be drawn up in such a way as to facilitate the service providers' and users' freedom of action without unduly limiting the telecommunications organizations' responsibility for the functioning of the network and the best possible condition of communications channels.

Member States may, in accordance with Community law, take any measure enabling the telecommunications organizations to develop the new opportunities deriving from open network provision.

**2. Harmonized technical interfaces and/or service features**

In drawing up open network provision conditions the following scheme should be taken into account for the definition of technical interfaces at appropriate open network termination points:

- for existing services and networks, existing interfaces should be adopted;
- for entirely new services or the improvement of existing services, existing interfaces should also be adopted, as far as feasible. When existing interfaces are not suitable, enhancements and/or new interfaces will have to be specified;
- for networks that are still to be introduced, but for which the standardization programme has already commenced, open network provision requirements falling within the terms of Article 3 should be taken into account when specifying new interfaces.

Open network provision proposals must, wherever possible, be in line with the ongoing work in the European Conference of Postal and Telecommunications Administrations (CEPT), CCITT, ETSI and CENELEC.

Work undertaken in this area shall take full account of the framework resulting from the provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations<sup>(1)</sup>, as last amended by Directive 88/182/EEC<sup>(2)</sup>, Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment<sup>(3)</sup> and Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications<sup>(4)</sup>.

Additional features will be identified where required. They may be classified as:

- inclusive if they are provided in association with a specific interface and included in the standard offering,
- optional if they can be requested as an option with regard to a specific open network provision offering.

Work shall include the drawing up of proposals for time schedules for the introduction of interfaces and service features, taking account of the state of development of telecommunications networks and services in the Community.

**3. Harmonized supply and usage conditions**

Supply and usage conditions shall identify conditions of access and of provision of services, as far as required.

They may include as applicable:

- (a) supply conditions such as:
- maximum provision time (delivery period);
  - quality of service, in particular the quality of transmission,
  - maintenance,
  - network malfunction reporting facilities;

<sup>(1)</sup> OJ No L 109, 26. 4. 1983, p. 8.

<sup>(2)</sup> OJ No L 81, 26. 3. 1988, p. 75.

<sup>(3)</sup> OJ No L 217, 5. 8. 1986, p. 21.

<sup>(4)</sup> OJ No L 36, 7. 2. 1987, p. 31.

- (b) usage conditions such as:
- conditions for resale of capacity,
  - conditions for shared use,
  - conditions for interconnection with public and private networks.

Usage conditions may include conditions regarding access to frequencies, as applicable, and measures concerning protection of personal data and confidentiality of communications, where required.

#### *Harmonized tariff principles*

Tariff principles must be consistent with the principles set out in Article 3 (1).

These principles imply, in particular, that:

- tariffs must be based on objective criteria and especially in the case of services and areas subject to special or exclusive rights must in principle be cost-oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions. When these tariffs are determined, one of the aims should be the definition of efficient tariff principles throughout the Community while ensuring a general service for all,
- tariffs must be transparent and must be properly published,
- in order to leave users a choice between the individual service elements and where technology so permits, tariffs must be sufficiently unbundled in accordance with the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must, as a general rule, be charged independently of the inclusive features and transportation as such,
- tariffs must be non-discriminatory and guarantee equality of treatment.

Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing in the global cost of the resources used and the need for a reasonable level of return on investment.

There may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-periods, provided that the tariff differentials are commercially justifiable and do not conflict with the above principles.



## ANNEX III

**Guidelines for implementation of the framework Directive up to 31 December 1992**

In an initial phase, and without prejudice to the procedures laid down in Article 4 (2) and (3), work to be undertaken in 1990, 1991 and 1992 concerning Articles 4, 5 and 6 will implement the following priorities:

1. adoption of specific Directives pursuant to Article 6 covering leased lines and the voice telephony service;
  2. implementation by 1 January 1991 of harmonized technical interfaces and/or service features for packet-switched data services and ISDN (Integrated Services Digital Network); reference to such interfaces and features may be made compulsory before that date in accordance with the procedure set out in Article 5 (3);
  3. adoption by the Council by 1 July 1991, acting on a proposal from the Commission, of a recommendation on the supply of technical interfaces, conditions of usage and tariff principles applying to provision of packet-switched data services complying with open network principles; this recommendation would in particular call on Member States to ensure that at least one such service was provided on their territory;
  4. adoption by the Council by 1 January 1992, acting on a proposal from the Commission, of a similar recommendation on ISDN;
  5. examination in 1992, with a view to its adoption, on a proposal from the Commission, of a specific Directive on packet-switched data services. That proposal should take into account the initial results of the implementation of the recommendation referred to in point 3;
  6. subsequent examination of a proposal for a Directive on ISDN. That proposal should also take into account the initial results of the implementation of the recommendation referred to in point 4.
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